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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

YELLOWCAKE, INC., California
corporation,

Plaintiff,

v.

HYPHY MUSIC, INC.,

Defendant.

Case No.: 1:20-cv-00988-DJC-JDP

[Reassigned to the Hon. Daniel J. Calabretta]

**DEFENDANTS' OBJECTION TO NEW
EVIDENCE FILED IN SUPPORT OF
PLAINTIFF AND COUNTER-
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

HYPHY MUSIC, INC.,

Counterclaimant,

v.

YELLOWCAKE, INC.; COLONIZE
MEDIA, INC; JOSE DAVID
HERNANDEZ; and JESUS
CHAVEZ SR,

Counter-Defendants.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. THIS COURT SHOULD STRIKE ALL NEW EVIDENCE AND**
3 **ARGUMENTS IMPROPERLY OFFERED BY PLAINTIFF AND**
4 **COUNTER-DEFENDANTS IN THEIR REPLY**

5 Plaintiff and Counter-Defendants have filed an astonishing *twenty-three*
6 pages of ***brand new***, third-party witness declarations and exhibits **as part of their**
7 **Reply** in support of their Motion for Summary Judgment (“***Motion***”). *See*, Dkt.
8 No. 90.

9 This includes declarations from witnesses who had previously submitted
10 declarations in connection with the Motion and/or the Opposition filed by Plaintiff
11 and Counter-Defendants to *Defendants’* Motion for Summary Judgment (*e.g.*,
12 Jesus Chavez, Sr.). Plaintiff and Counter-Defendants had ***every opportunity*** to
13 previously brief this matter thoroughly and in a manner that would have afforded
14 Defendants an opportunity to respond, but waited until past the eleventh hour to
15 submit new evidence and arguments never raised in their moving papers.

16 This is **highly improper** and cannot be permitted by this Court. A moving
17 party is not permitted to offer new evidence or arguments in its reply. Indeed, the
18 body of caselaw on this elementary and fundamental point of civil procedure is
19 massive, with a few examples set forth here:

- 20 • *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (“[A]rguments
21 **raised for the first time in a reply brief are waived**”);
- 22 • *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (**court should not**
23 **consider new evidence submitted in reply without affording non-**
24 **moving party opportunity to respond**);
- 25 • *Clark v. State of California*, 739 F. Supp. 2d 1168, 1223 n.14 (N.D. Cal.
26 2010) (“Defendants have submitted new evidence ... [B]ecause
27 **Defendants have failed to explain why this evidence was not developed**
28 **in a timely manner... this Court declines to consider it.”)**

- *Townsend v. Monster Beverly*. 303 F. Supp. 1010, 1027 (CD Cal. 2018) (“**new evidence submitted as part of a reply is improper because it does not allow the defendant an adequate opportunity to respond**”);

Worse still, Plaintiff and Counter-Defendants appear to attach, as an Exhibit to a newly introduced Declaration from Jesus Chavez Sr., an un-bates-stamped document that was never produced in discovery. This is remarkable considering one of the key issues before this Court is Plaintiff and Counter-Defendants’ abject disregard for its Rule 26 Initial Disclosure obligations.¹ In filing their Reply with such improperly added, previously undisclosed, new evidence, Plaintiff and Counter-Defendants essentially asks that this Court to sanction a total abdication of their responsibilities in discovery.

Plaintiff and Counter-Defendants’ eleventh-hour games threaten the integrity of this Court. And their lack of diligence is no excuse. Any new arguments in their Reply brief based upon improperly introduced, new declarations must be stricken, as those arguments have been waived.

II. CONCLUSION

Based upon the foregoing, Defendants respectfully request that this objection be sustained.

DATED: October 2, 2023

ALTVIEW LAW GROUP, LLP

By: 

JOHN M. BEGAKIS
Attorneys for Defendant/Counterclaimant
HYPHY MUSIC, INC., a California
corporation

¹ This introduction of brand new evidence is also ironic considering Plaintiff’s own efforts to attack the validity of the Assignments obtained, and produced, by Defendants because Defendants initially produced them after the discovery cut-off period (but were later permitted by the Court to do so). *See*, Dkt. No. 59.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing electronically filed document has been served via a “Notice of Electronic Filing” automatically generated by the CM/ECF System and sent by e-mail to all attorneys in the case who are registered as CM/ECF users and have consented to electronic service pursuant to L.R. 5-3.3.

Dated: October 2, 2023

By: /s/ John Begakis
John M. Begakis